

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
WHITE CARRIAGE CORPORATION	:	
	:	DETERMINATION
	:	DTA NO. 808336
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1982	:	
through May 31, 1987.	:	

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Petitioner White Carriage Corporation, 49 Jane Road, Hauppauge, New York 11788-4712 filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1982 through May 31, 1987.

A hearing was commenced before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on December 10, 1991 at 9:15 A.M. and continued to completion on May 5, 1992, with all briefs to be submitted by August 28, 1992. Petitioner's brief was filed on July 15, 1992, the brief of the Division of Taxation was filed on August 14, 1992, and petitioner's reply brief was filed on August 27, 1992. Petitioner appeared by Matthew Dollinger, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

- I. Whether the Division of Taxation was authorized to use a test period audit to determine taxes due from petitioner on its purchases.
- II. Whether petitioner was denied the opportunity to prove that sales tax assessed against it was paid by another party.

FINDINGS OF FACT

On March 30, 1989, the Division of Taxation ("Division") issued to petitioner, White Carriage Corporation, three notices of determination and demands for payment of sales and use

taxes due. The first notice assessed tax due for the period December 1, 1982 through May 31, 1986 in the amount of \$90,282.81, plus penalty and interest. The second notice assessed tax due for the period June 1, 1986 through May 31, 1987 in the amount of \$13,311.64, plus penalty and interest. The third notice assessed penalty only for the period June 1, 1985 through March 31, 1987 in the amount of \$14,021.89.

White Carriage owned and operated a bus service which provided services to various school districts on Long Island. At the time the audit commenced, White Carriage had been sold. Petitioner claimed that it was sold in May or June 1986. The audit report states that the business was sold on March 31, 1987.<sup>1</sup>

An audit of White Carriage began in July 1987. The auditor placed a telephone call to White Carriage and was told to contact Stanley Hirsch, one of the principals of the corporation. The auditor did so. According to the Tax Field Audit Record (a handwritten log of personal contacts maintained by the auditor), the auditor spoke by telephone with Mr. Hirsch, his secretary or his accountant approximately 11 times over the next 10 months. The auditor testified that Mr. Hirsch and his accountant told the auditor that many of the business's records were misplaced or unavailable. In several conversations with the auditor, Mr. Hirsch indicated that he and his accountant were putting together the documents requested by the auditor. White Carriage's accountants were identified as Aaron Perel and Alan Jacobson.

The first field audit appointment was held on June 27, 1988. The auditor transcribed records made available at that meeting and left a list of other records that would be needed for the audit with Mr. Jacobson. Among the items requested were records of sales for the period December 1, 1982 through February 1, 1987; records of cash disbursements for the same period; records of parts purchases and garage purchases for the month of February 1986; invoices and cancelled checks for all assets bought and sold with a value of over \$1,000.00; a

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<sup>1</sup>The nature of this sales transaction is not described in the record. It is not known whether the business was sold in its entirety or only the tangible assets were sold. Petitioner offered no proof of the date of the sale.

copy of the closing statement relating to the sale of White Carriage; and monthly records of sales for the period December 1, 1982 through February 1, 1987. The records made available to the auditor included sales tax returns, Federal income tax returns, a check disbursements journal and a general ledger. White Carriage also produced some purchase invoices. The auditor was told that many of the corporation's records were misplaced or were not available. In an affidavit, Mr. Hirsch indicates that he lost possession of many of the records of White Carriage after its sale.

The auditor compared receipts reported on Federal returns with receipts shown in the general ledger and found no significant discrepancies. Receipts from operating a transportation service such as petitioner's are not subject to sales tax. Consequently, the purpose of the audit was to verify that White Carriage paid sales or use tax on all of its taxable purchases. The auditor decided to conduct a test period audit of expense purchases, selecting February 1986 as the test period. The field audit report states that Alan Jacobson agreed that the period selected was representative of the audit period. The auditor indicated in his testimony that the month of February 1986 was selected, in part, because it was thought that more invoices would be available for that period than for earlier periods.

The auditor reviewed purchases in two accounts: parts and garage purchases. He attempted to verify taxes paid by comparing purchase invoices to entries in White Carriage's cash disbursements journal and general ledger. Purchase invoices were missing for more than half of the entries. The invoices that were provided showed that White Carriage did not pay sales tax on all of its purchases. The auditor treated all purchases shown in either the cash disbursements journal or general ledger as subject to tax unless an invoice was provided which showed tax paid. Using this method, the auditor estimated that White Carriage failed to substantiate sales tax paid on 60 percent of its parts purchases and 32 percent of its garage purchases for the test period. These percentages were referred to by the auditor as an error rate. The auditor applied the 60 percent error rate to quarterly purchases of parts and the 32 percent error rate to quarterly purchases of garage items as shown in the general ledger or cash

disbursements journal. This methodology yielded tax due on expense purchases of \$94,022.12 for the audit period.

The auditor estimated tax due on asset purchases of \$9,572.33. The items in this category were mostly buses and other vehicles. Books and records were reviewed for the entire period and the auditor found that invoices were not available for each purchase. The auditor was provided with Department of Motor Vehicles registration receipts and cancelled checks showing payments made to the "Sales Tax Bureau" which he accepted as proof of tax paid on some purchases. In addition, the auditor was provided with a letter from Motorola Communications and Electronics, Inc., stating that Motorola collected and paid sales tax on all sales to White Carriage. The auditor accepted this letter as proof of tax paid on all White Carriage purchases from Motorola.

During the course of the audit, the auditor was provided with a power of attorney appointing Alan Jacobson of the "Accounting Office of Aaron Perel CPA" to represent White Carriage on audit. The notice of appearance which is found on the same form was signed by Aaron Perel rather than Alan Jacobson.

The Division assessed a penalty of \$10,000.00 against White Carriage for failure to register as a vendor. Pursuant to a Conciliation Order dated April 27, 1990, that penalty was cancelled.

In an affidavit, Mr. Hirsch stated that White Carriage paid all sales taxes billed by its vendors and assumed that the vendors were properly charging all sales tax due.

Prior to the first administrative hearing, White Carriage served the Division with a Judicial Subpoena Duces Tecum signed by the Honorable Harry H. Kutner, Justice of the Supreme Court of Nassau County. The documents sought by this subpoena consisted of all sales tax returns, payment records, and correspondence related to 14 vendors. Apparently these are vendors with whom White Carriage did business.

The hearing which commenced on December 10, 1991 was continued to allow White Carriage an opportunity to enforce the subpoena or seek the documents requested through

another avenue.

At the continued hearing, White Carriage's representative stated that he had made a Freedom of Information request for documents subpoenaed and that the request was denied by the Division. The Division's attorney stated that he had instigated a search of the Division's files and was prepared to place in evidence all documents relating to the 14 vendors which were in the Division's possession and deemed by the Administrative Law Judge to be relevant to the proceedings.

After a search of the files, the Division determined that 6 of the 14 vendors for whom records were subpoenaed were never registered with the Division. The Division had no files related to those vendors. The Division located files relating to five of the remaining eight vendors. The administrative law judge ruled that sales tax returns filed by the vendors were not relevant to the proceedings because such returns do not identify the persons to whom sales are made or the amount of sales tax collected from individual customers; therefore, the returns could not be used to establish that White Carriage paid sales tax to the particular vendor. Documents relating to three vendors consisted entirely of sales tax returns and, in one case, documents related to a bulk sale of assets. These were all ruled to be inadmissible on grounds of relevancy. The Division's files contained audit reports and related documents for two vendors. Petitioner's representative was allowed to review these documents to determine whether they contained information relevant to the audit of White Carriage. Inasmuch as his review failed to disclose any such information, the files of the remaining two vendors were held to be inadmissible on grounds of relevance.

Pursuant to section 306.4 of the State Administrative Procedure Act, official notice is taken of the following facts: New York State sales tax returns do not require a vendor to report the source of his sales; as a consequence, it cannot be determined from reviewing a completed return whether sales tax was collected from any particular customer.

#### SUMMARY OF PETITIONER'S POSITION

Petitioner asserts that the Division's authority to employ an indirect audit method is

premised upon the requirement that vendors maintain verifiable records of sales. It argues that since it was not a vendor of taxable personal property or services it had no statutory obligation to maintain books and records; therefore, the Division had no authority to employ an indirect method of determining tax due based upon its failure to produce such records.

Taking the position that petitioner was entitled to an unabridged audit, petitioner argues that it never agreed to a test period audit. Petitioner notes that Alan Jacobson never signed the notice of appearance which accompanied the power of attorney authorizing him to act as petitioner's representative. Moreover, petitioner claims that Mr. Jacobson did not knowingly waive petitioner's right to a full and unabridged audit.

Petitioner claims that it was deprived of the ability to prove that the Division's assessment of tax is erroneous by evidentiary rulings which held that the sales tax returns of petitioner's vendors are irrelevant to these proceedings. Petitioner states in its brief:

"Had WHITE CARRIAGE been permitted to review and introduce into evidence the tax returns filed by its vendors, which were subpoenaed from the State for purposes of this hearing, it would have been able to establish that its sellers paid tax on all taxable sales made by them."

#### CONCLUSIONS OF LAW

A. Section 1105(a) of the Tax Law imposes a sales tax on the receipts from every retail sale of tangible personal property in New York unless exempted from taxation by a provision of article 28. Under section 1132(a) of the Tax Law, vendors are required to collect tax from their customers when collecting the price for any item to which the sales tax applies. However, a vendor's statutory duty to collect tax does not shield his customer from liability for payment of any tax which the vendor fails to collect. Tax Law § 1133(b) provides:

"Where any customer has failed to pay a tax imposed by this article to the person required to collect the same, then in addition to all other rights, obligations and remedies provided, such tax shall be payable by the customer directly to the [commissioner of taxation and finance] and it shall be the duty of the customer to file a return with the tax [commissioner] and to pay the tax to [him] within twenty days of the date the tax was required to be paid" (emphasis added).

Tax Law § 1138(a)(1) provides:

"If a return required by this article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the

commissioner of taxation and finance from such information as may be available."

Tax Law § 1132(c) creates a presumption that the receipts from the sale of property and services of the type taxed under section 1105 of the Tax Law are subject to sales tax, unless the contrary is established, and the burden of proof to show that any such receipt is not subject to tax is upon the person required to collect the tax or the customer.

B. Petitioner's first contention is that the Division had no authority to estimate tax due on the basis of a test period audit. Petitioner argues that since it was not a vendor of taxable property or services it had no obligation to maintain books and records; therefore, says petitioner, its failure to provide proof that it paid all sales taxes due cannot serve as a basis for utilizing a test period audit. Petitioner contends that the Division was required to obtain its consent before performing a test period audit and that such consent was never given.

In support of its contention, petitioner relies on that body of authority which holds that the Division may not resort to a test period audit to determine sales tax due from a vendor if the vendor maintains and provides the records required to conduct a complete audit (see, Matter of Carmine Restaurant v. State Tax Commn., 99 AD2d 581, 471 NYS2d 402; Matter of Chartair v. State Tax Commn., 65 AD2d 44, 411 NYS2d 41). Petitioner misconstrues the case law.

In Matter of Chartair v. State Tax Commn. (supra), the court held that a vendor who maintains complete records from which the exact amount of tax due can be determined is entitled to a complete audit of those records. A vendor's entitlement to a complete audit rests upon its maintenance of the records it is required to keep by statute (see, Matter of James G. Kennedy & Co. v. Chu, 125 AD2d 773, 509 NYS2d 199; Matter of Names in the News v. State Tax Commn., 75 AD2d 145, 429 NYS2d 755). Apparently, petitioner takes the position that a taxpayer (not a vendor) who does not provide verifiable records of its purchases and tax paid on those purchases is nonetheless entitled to a complete audit of its records. Chartair and the cases following it lend no support to such a position.

Section 1132(c) of the Tax Law creates a presumption that all receipts for the purchase of tangible personal property are subject to tax. Pursuant to that statute, petitioner bore the burden

of proof to establish that it paid sales tax on all purchases subject to tax. Without question, petitioner failed to provide the auditor with such proof. The auditor testified that he was told by Mr. Hirsch that many purchase invoices for the audit period were missing or unavailable. Mr. Hirsch's affidavit essentially substantiated that testimony. If, at the time of audit, petitioner had purchase invoices available to substantiate payment of tax on all taxable items as shown in its cash disbursement journal or general ledger, the use of a test period audit would have been arbitrary and capricious. Inasmuch as purchase invoices were not available for the entire audit period, the Division was obliged to devise a reasonable method to determine the tax due (Matter of W. T. Grant v. Joseph, 2 NY2d 196, 159 NYS2d 150, cert denied 355 US 869). It might simply have relied on the presumption of section 1132(c) and assessed tax on all purchases of property or services taxable under Tax Law § 1105, unless petitioner proved that the tax was paid. Instead, the Division elected to conduct a test period audit. In the absence of complete records, the Division was authorized to use such a methodology (Tax Law § 1138[a][1]). The burden was on petitioner to prove that "the result of the method used was unreasonably inaccurate or that the amount of tax assessed is erroneous" (Matter of Meskouris v. Chu, 139 AD2d 813, 526 NYS2d 679). Petitioner has not carried its burden of proof.

The arguments advanced by petitioner to establish that the audit was unreasonable are meritless. Petitioner claims that the auditor should have examined the sales tax returns of petitioner's vendors, stating:

"[a] review of those records would have resolved this matter. It does not matter that the Tax Returns of those vendors only show gross sales and that they are not broken down by customer. If their total sales are accurately reflected, then ipso facto taxes on the sales to their customers, including White Carriage, were properly paid."

The Division's acceptance of a vendor's sales tax returns for filing does not mean that the returns are accurate. The sales tax returns of petitioner's vendors contain no information which would enable the Division to determine whether petitioner paid all sales taxes due on its purchases.

Petitioner argues that the auditor should have conducted an audit which considered the



volume of business done with particular vendors. It theorizes that the purchases made in the test period did not accurately reflect purchases made throughout the audit period. This argument ignores petitioner's own burden of proof and attempts to shift the burden to the Division. Petitioner had a duty to pay sales tax due directly to its vendors or to file sales tax returns paying all tax due on its purchases of taxable property and services (Tax Law § 1133[b]; see, Matter of East End Transportation Corp., Tax Appeals Tribunal, March 26, 1992). The auditor's review of the available purchase invoices showed that petitioner failed to pay all sales tax due directly to its vendors and never filed sales tax returns. The burden was on petitioner to show by clear and convincing evidence that the test period audit did not reflect petitioner's actual purchases and the tax due on those purchases. Petitioner offered no evidence of its purchases or of taxes paid and thus failed to carry its burden of proof.

Since petitioner did not have adequate records of purchases available, the Division was not required to obtain petitioner's consent before resorting to a test period audit. Consent is only required where the taxpayer has provided complete and verifiable records (see, Matter of James G. Kennedy & Co. v. Chu, supra).

C. Petitioner claims that it was deprived of the opportunity to show that all tax due was collected by petitioners' vendors. Petitioner looked to the tax returns of its vendors to carry its burden of proof and sought to place those returns in evidence. Tax Law § 1146(a) prohibits the disclosure of the contents of a return or report filed with the Division, except under limited circumstances. Disclosure is prohibited:

"except . . . on behalf of any party to any action, proceeding or hearing under the provisions of this article when returns, reports or facts shown thereby are directly involved in such action, proceeding or hearing, in any of which events the court, or in the case of a hearing, the [tax appeals tribunal] may require the production of, and may admit into evidence, so much of said returns, reports or of the facts shown thereby, as are pertinent to the action, proceeding or hearing and no more."

As stated in the Findings of Fact, sales tax returns do not contain the kind of information sought by petitioner. There is no possible way to trace sales reported on a sales tax return to a particular purchase. Since the returns contained no information pertinent to these proceedings, it would have been contrary to Tax Law § 1146(a) to admit them into evidence.

D. The petition of White Carriage Corporation is denied, and the notices of determination and demands for payment of sales and use taxes due, as modified by the Conciliation Order dated April 27, 1990, are sustained.

DATED: Troy, New York  
January 7, 1993

/s/ Jean Corigliano  
ADMINISTRATIVE LAW JUDGE